

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : Criminal No.
 :
 vs. :
 :
 ANGEL GONZALEZ : 02-534

MEMORANDUM

Baylson, J.

August 22, 2003

On December 3, 2002 , following a trial by jury, Defendant was convicted, under 18 U.S.C. 922(g)(1), for possession of a firearm, having previously been convicted of a crime punishable by imprisonment for more than one year. Presently before this Court is Defendant’s Motion for Judgment of Acquittal, Arrest of Judgment or For New Trial Pursuant to Fed. R. Crim. P. 29, 33 and 34 (herein “Motion”). For the reasons which follow, Defendant’s motion will be denied.

I. Legal Standards

Defendant moves for a judgment of acquittal under Rule 29, a new trial under Rule 33, or an arrest of judgment under Rule 34. Where a defendant moves for a judgment of acquittal, on the ground that insufficient evidence supports the jury’s verdict of guilty, this Court must “review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence.” *United States v. Smith*, 294 F.3d 473, 476 (3d Cir. 2002). The court may not re-weigh the evidence, nor reassess the credibility of witnesses, as both of these functions are for the jury. *See United States v. Casper*, 956 F.2d 416, 421 (3d Cir.1992). A judgment of acquittal may be entered only where no rational trier of fact could conclude beyond a reasonable doubt that the defendant committed the crimes charged. *See United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir. 1984). Accordingly, a

finding of insufficiency should be “confined to cases where the prosecution’s failure is clear.” *Smith*, 294 F.3d at 477.

Under Rule 33, this Court “may vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33. Within its discretion, the court may grant a new trial only if it believes that “there is a serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted.” *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002). In addition, the court must grant a new trial if errors occurred during the original trial and it is reasonably possible that such errors substantially influenced the jury's decision. *See United States v. Mastro*, 570 F.Supp. 1388, 1390 (E.D. Pa.1983).

With respect to the Defendant’s Rule 34 motion, Defendant has provided no basis for an arrest of judgment. This Court should grant an arrest of judgment only where: “(1) the indictment or information does not charge an offense; or (2) the court does not have jurisdiction of the charged offense.” Fed. R. Crim. P. 34. Though the title of Defendant’s motion includes a reference to Rule 34, Defendant nowhere in his brief suggests that the indictment failed to charge an offense or that this Court lacks jurisdiction. Accordingly, the Rule 34 motion must be denied. *See United States v. Dandridge*, No. Crim. 89-430-1, 1990 WL 18670, at *4 (E.D. Pa. Feb. 22, 1990) (denying motions for arrest of judgment where defendants failed to assert either that indictment or information did not charge an offense or that court was without jurisdiction of the offense charged); *United States v. Hudson*, 422 F.Supp. 395, 396 n.1 (E.D. Pa. 1976) (same).

II. Facts

The government presented the testimony of two Philadelphia police officers involved in Defendant’s arrest. Officer John Krivulka testified that, on the night of October 15, 2001, he and his partner, Officer Joseph Leighhardt, responded to a radio call regarding a burglary in progress

at 218 West Sergeant Street in Philadelphia. *See* Tr. (12/2) at 30. Upon arriving at that location, Officer Krivulka observed “an old Chevrolet,” possibly a “‘66 Chevy,” parked in front of 218 West Sergeant Street, partially on the sidewalk and partially on the street, facing westbound. *Id.* at 32-33. Officer Krivulka parked the patrol car in front of the Chevrolet, facing east, such that the fronts of the two cars were within “a couple of feet” of each other. *Id.* The parked Chevrolet’s engine was running. *Id.* at 34.

Officer Krivulka testified: “As we pulled up onto the block, I observed the defendant exit the driver’s side of the vehicle.” *Id.* at 35. The officer explained that Defendant “was exiting, so he was sitting in the car getting out.” *Id.* Officer Krivulka identified Defendant in the courtroom as the man he saw exiting the Chevrolet. *See id.* After exiting through the front, driver’s side door of the car, *see* Tr. (12/2) at 49, Defendant left the car door open and walked over to the front steps of the house at 218 West Sergeant Street, where another male individual was sitting. *See id.* at 35, 50. No other person was in the Chevrolet, nor in the general vicinity. *See id.* at 35.

Officer Krivulka exited his patrol car and walked past the driver’s side of the Chevrolet. He looked into the vehicle “and observed a handgun on the front seat of the car.” Tr. (12/2) at 36. The officer testified that, at this point, he “stopped, did a double-take to make sure that I saw what I think I saw, and confirmed that it was a gun.” *Id.* Officer Krivulka’s partner, Officer Leighhardt, was already speaking with Defendant and the other male when Krivulka approached Leighhardt and told him that there was a gun on the front seat of the car. Officer Leighhardt instructed Defendant to turn around and put his arms behind his back. At that instant, Defendant “used both hands and pushed” Officer Leighhardt. Defendant then fled on foot eastbound, and was eventually apprehended. *See* Tr. (12/2) at 36, 40.

Once Defendant fled, Officer Krivulka notified police radio personnel that a foot chase was in progress and gave a general description of Defendant. He also secured the other male individual, who was eventually identified as Miguel Molino, and placed him in the patrol car. *See id.* at 37. Finally, Officer Krivulka returned to the Chevrolet and recovered the handgun that was still on the front seat, across from the steering wheel. *See id.* at 37, 40. The gun was loaded with one round in the chamber and six rounds in the magazine. The officer unloaded it and eventually brought the weapon to the police evidence room and placed a property receipt number on it. *See id.* at 38. Officer Krivulka checked the firearm out of evidence for the purpose of bringing it to court. *See id.* at 39. The officer also ran a record check on the vehicle and determined that it was registered to “another person,” but not reported stolen. *Id.* at 41. The testimony at trial did not clearly establish who owned the vehicle.

Officer Leighhardt testified that, when the two officers arrived on the scene, he also observed Defendant exiting the Chevrolet, via the driver’s side door, then walking toward the house. *See Tr. (12/2)* at 72. He did not see Defendant sitting in the car, but did see him exit from it. *See id.* at 74. As soon as the patrol car stopped, Officer Leighhardt exited the vehicle and walked towards the two men on the front steps of the house. *See id.* at 73. Defendant was pacing back and forth as the officer approached. *See id.* at 74. When Officer Leighhardt, upon learning that there was a gun in the vehicle, instructed Defendant to put his arms behind his back, Defendant pushed Officer Leighhardt backwards and fled. *See id.* at 75. Defendant was apprehended after a chase, and placed under arrest.

III. Discussion

The relevant statute provides:

It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding

one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 922(g)(1). Accordingly, the three elements of this offense, which the government must prove beyond a reasonable doubt, are (1) that Defendant had previously been convicted of a crime punishable by imprisonment for a term exceeding one year; (2) that he *knowingly possessed* a firearm; and (3) that the firearm had passed in interstate commerce. *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000).

Defendant stipulated to the fact that he had previously been convicted of a crime punishable by a prison term exceeding one year. *See* Transcript of Trial (Dec. 2, 2002) (herein “Tr. (12/2)”) at 92. Nor does Defendant now challenge the government’s proof as to the interstate commerce element. Defendant does not dispute that the handgun recovered by the officers was a “firearm,” within the meaning of that term under 18 U.S.C. 922(g)(1); moreover, the government presented expert evidence which was more than adequate to establish that fact. *See* Tr. (12/2) at 101.

Defendant avers that “[n]o reasonable jury could have concluded that Mr. Gonzalez was in possession of the items recovered during the search of the car,” because the government “did not prove that the gun was constructively possessed by Mr. Gonzalez (i.e. that he had knowledge and intent to control these items).” Motion at 2. Thus, Defendant asserts that this Court should grant him a judgment of acquittal under Rule 29.

A. Sufficiency of Evidence

The knowing possession element does not require the government to prove that Defendant actually held a firearm on his person. Rather, the government may establish “constructive possession,” by showing that Defendant had “both the power and the intention” to exercise “dominion or control” over the object in question, either directly or through another person. *United*

States v. Iafelice, 978 F.2d 92, 96 (3d Cir. 1992). Constructive possession requires not only “dominion and control” over an object, but also knowledge of that object’s existence. *See id.* Constructive possession is not established by “mere proximity” to the object, “or mere presence on the property where it is located or mere association with the person who does control” the object. *United States v. Jenkins*, 90 F.3d 814, 818 (3d Cir. 1996).

This Court has upheld a conviction under § 922(g)(1), with similar evidence, finding sufficient evidence that the defendant constructively possessed a firearm. *See United States v. Figueroa*, No. Crim. A. 00-94, 2000 WL 1341923, at *5 (E.D. Pa. Sep 18, 2000), *aff’d* 281 F.3d 225 (3rd Cir. 2001) (Table). In *Figueroa*, the evidence established that the defendant drove the vehicle in which a revolver was found, that he had substantial control over the car, and that, immediately before the car was searched, he was seen leaning in his seat, beneath which the gun was found. The Court found that a jury could reasonably infer knowing possession. *See* 2000 WL 1341923, at *4.

In the present case, as explained above, Defendant was arrested after two police officers, responding to a burglary call, observed Defendant exiting the driver’s side of a parked vehicle, and, immediately thereafter, one of the officers observed a handgun sitting on the front seat of that same vehicle. Courts have found sufficient evidence of constructive possession of a firearm found within a vehicle, where the defendant was observed in or near the vehicle. *See United States v. Jones*, 84 F.3d 1206, 1211 (9th Cir. 1996) (finding evidence of possession of gun sufficient where officers found gun, disguise and robbery proceeds under back seat of taxi which defendant exited); *United States v. Gill*, 58 F.3d 334, 336 (7th Cir. 1995); *United States v. Garrett*, 903 F.2d 1105, 1111 (7th Cir. 1990); *Figueroa*, 2000 WL 1341923, at *5.

In *Gill*, a police officer observed a vehicle parked along the side of a road, with its engine running, and the defendant “crouched down” in the passenger’s seat. 58 F.3d at 335. The defendant

told the officer that he was waiting for his friend, the driver, to return. The defendant acknowledged that a pile of clothing on the back seat belonged to him. Upon learning that the vehicle was stolen, the officer arrested the defendant, searched the car, and uncovered a gun beneath the pile of clothes. The defendant denied any knowledge of the gun's existence. *See id.* The supposed driver of the car never returned and was never found by police. *Id.* at 335 n.2. The defendant, a convicted felon, was convicted under § 922(g)(1), and the Seventh Circuit affirmed. The *Gill* court held that a “sufficient nexus” existed between the defendant and the firearm to permit a rational jury to find knowledge of the gun and constructive possession. *Id.* at 336. *See also Garrett*, 903 F.2d at 1109-1111 (finding sufficient evidence of constructive possession where defendant was observed “attempting to enter” vehicle in which firearm was found, underneath a paper bag on floorboard below steering wheel, and defendant possessed keys fitting ignition and door, though vehicle and gun not registered to defendant). *But see United States v. Chairez*, 33 F.3d 823, 825 (7th Cir.1994) (vacating firearm possession conviction where gun was found *under passenger seat* in which defendant was sitting, yet no other link was shown between defendant and the firearm).

Based on the above testimony, the jury returned a verdict of guilty, finding that Defendant, as a convicted felon, had knowingly possessed a firearm. Defendant does not point to any specific reason why the evidence discussed above is insufficient to support a guilty verdict. While no evidence was set forth to show that Defendant owned the vehicle in question, or had actually driven that vehicle, the jury was entitled to credit the testimony of Officer Krivulka, who observed Defendant exiting through the front, driver's side door of the Chevrolet. *See Tr. (12/2)* at 49. As the officer explained, Defendant “was exiting, so he was sitting in the car getting out.” *Tr. (12/2)* at 35. Just seconds later, Officer Krivulka observed the firearm sitting on that same front driver's seat, across from the steering wheel. *See id.* at 40. The firearm was so plainly visible that Officer

Krivulka noticed it upon first walking by the vehicle. *See id.* at 35. It was perfectly reasonable for the jury to infer that Defendant, having just sat in that same front seat, knew of the gun's presence and had the power and intention to exercise control over it.

Accordingly, because the evidence, viewed in the light most favorable to the government, supports the jury's finding, the Rule 29 motion will be denied.

B. Motion for New Trial

With respect to Defendant's Rule 33 motion, based on all of the above evidence, this Court cannot find that there exists a serious danger that a miscarriage of justice has occurred. *See Johnson*, 302 F.3d at 150.

In support of his Rule 33 motion, Defendant asserts that this Court committed error in allowing the government to inquire of a defense witness, Miguel Molino, on cross examination, regarding his knowledge of or affiliation with certain "gang" members. Mr. Molino was the other male individual who was with Defendant on the night of Defendant's arrest. *See* Transcript of Trial (Dec. 3, 2002) (herein "Tr. (12/3)") at 23-25. Molino took the stand as a defense witness and testified that he had known Defendant for at least six years, since meeting him while working at a garage. *See id.* at 33. The witness stated that, on the night of his arrest, Defendant had arrived at 218 West Sergeant Street in a white car, whereas the police recovered the gun from an old gold-colored car. According to Molino, Defendant never entered that gold car. *See id.* at 27-28. Thus, if Molino was believed, Defendant was innocent.

The prosecution cross examined Molino on a number of different grounds related to his credibility and possible bias. First, the government elicited from Molino the fact that, when the police first approached him, he "gave them an alias." *Id.* at 30. The witness acknowledged that he lied to the police "at the time." *Id.* at 31. Next, the government inquired about Molino's multiple

convictions, relating to drugs, terroristic threats, assault and resisting law enforcement. *See id.* at 31-33. The witness also admitted that he had violated probation a number of times. *See id.* at 32. Additionally, the prosecution asked Molino to describe a tattoo on his forearm. The witness explained that the tattoo contained a three-word message, “fuck the law.” *Id.* at 35. The prosecution then asked Molino whether other tattoos on his body were “associated with a particular gang,” of which he was a member. *Id.* The witness answered “no,” and the government attorney then followed up by asking “you’re not involved with any gang?” *Id.* at 36. Molino again said no.

The government also inquired whether the witness “hung out” in a certain area of 8th Street. *See Tr. (12/3)* at 34. When Molino replied “no,” the government asked him whether he knew anyone named “the Carbonellas.” *Id.* The witness said that he did not. *See id.* Next, the government inquired as to whether the witness knew “anyone by the name of Raffi.” *Id.* at 38. Molino said no. The government then asked Molino whether he knew anyone named Freddie, June Bug, or Mike, who live in the area of 8th and Ontario Streets. The witness said he did not know those individuals, and the government followed up by asking “You don’t know that? You don’t know anyone associated with those gangs?” *Id.* at 39. Defense counsel objected on the ground that the question lacked foundation. The government withdrew the last question and ended its cross examination. *See id.*

Defendant contends that this Court committed error by allowing the government to question the defense witness, Molino, “concerning gang affiliations and his knowledge of gang activities when those issues were totally collateral to whether Mr. Gonzalez possessed a firearm on the night in question.” Motion at 2. Federal Rule of Evidence 611(b) provides that “[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters

as if on direct examination.” Fed. R. Evid. 611(b). It is well established that a district court “has wide discretion in determining the permissible scope of cross-examination.” *United States v. Dansker*, 537 F.2d 40, 60 (3d Cir. 1976). Moreover, a district court may permit government counsel to introduce facts which tend to show that a defense witness is biased, or motivated to lie. *See, e.g., United States v. Werme*, 939 F.2d 108, 114 (3d Cir. 1991).

The facts elicited by the government on cross-examination of Mr. Molino related specifically to his credibility and potential bias. The government questioned Molino very briefly concerning his knowledge of certain individuals. The prosecutor only mentioned the names of individuals, asking the witness whether he had knowledge of them, or whether he belonged to or was involved with any gang. Molino denied knowing such individuals or belonging to a gang. The government did not introduce any further evidence in this regard. Defense counsel objected to only one of these questions. Tr. (12/3) at 35.

In *United States v. Abel*, 469 U.S. 45, 48 (1984), the Supreme Court upheld a conviction where the government, at trial, was permitted to introduce evidence of a defense witness’s connection to a gang organization. After the defense witness denied belonging to such organization, the prosecutor called another witness, who testified that both the defendant and the defense witness belonged to the group, and that the group’s tenets required members to lie on each others’ behalf. *See id.* The Court held that such evidence was sufficiently probative of the defense witness’s bias to warrant its admission into evidence. *See id.* at 49.

In the instant case, this Court prohibited the government from introducing any rebuttal evidence concerning the witness’s connection to gangs. *See* Tr. (12/3) at 49. Thus, the jury heard only the briefest mention of “gangs,” without any specific details or proof that the witness was, in

fact, associated with them. Accordingly, the prosecutor's inquiries about gang activity in this case were surely less consequential than was the evidence admitted in *Abel*.

The government's vague reference to "gangs" was made briefly in the course of a rather exhaustive cross-examination attempting to impeach Molino's credibility. Therefore, even assuming that this Court should have precluded any impeachment question that in any way touched upon gang activity, it is not reasonably likely that the Court's decision to allow such questioning substantially influenced the jury's decision. *See Mastro, supra*, 570 F.Supp. at 1390.

VI. Conclusion

For the foregoing reasons, Defendant's Motion for Judgment of Acquittal, Arrest of Judgment or For New Trial Pursuant to Fed. R. Crim. P. 29, 33 and 34 is denied.

An appropriate Order follows.

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| | : | |
| ANGEL GONZALEZ | : | 02-534 |

ORDER

AND NOW, this day of , 2003, it is hereby ORDERED that the Defendant's Motion for Judgment of Acquittal, Arrest of Judgment or For New Trial Pursuant to Fed. R. Crim. P. 29, 33 and 34 is DENIED.

BY THE COURT:

MICHAEL M. BAYLSON, U.S.D.J.